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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

FILED
JAN 19 2006
Court of Appeal - First App. Dist.
DIANA HERBERT
By ________ DEPUTY

MARIA VELASQUEZ et al.,
Plaintiffs and Respondents,

v.

MONIKA KHUSHF,
Defendant and Appellant.

A110433

(San Francisco County Super. Ct. No. 431933)

After Monika Khushf (defendant) initiated arbitration proceedings, Maria Velasquez and Bich Khoi Do (plaintiffs) filed a complaint seeking a declaration that the dispute was not arbitrable, and petitioned for an injunction against further arbitration proceedings. The plaintiffs voluntarily dismissed their complaint with prejudice after the court granted defendant's cross-petition to compel arbitration. The court denied defendant's motion for attorney fees, without prejudice, on the ground that a determination of the prevailing party would be premature in light of the order compelling arbitration. Defendant appeals from that order.

Defendant contends that she was the prevailing party and was entitled to costs, including fees incurred defending the declaratory relief action and the related petition for an injunction against further arbitration proceedings, without regard to the outcome of the pending arbitration, and that her motion was not premature.

We shall conclude that the dismissal of the complaint for declaratory and injunctive relief left the case in the same procedural posture as an order compelling

arbitration. The appeal must therefore be dismissed because there is no final judgment or appealable order.

FACTS

The complaint for declaratory relief alleged that defendant purchased from plaintiffs certain real property located in San Francisco. The purchase and sale agreement included an arbitration clause. It further alleged that defendant had filed a notice of intention to arbitrate, but that plaintiffs contended the dispute was excluded from the arbitration provision because the dispute fell within an express exclusion of claims for "latent or patent defects to which Code of Civil Procedure §337.1 or §337.15 applies."[1] Plaintiffs sought a declaration that the court, not the arbitrator, must decide the issue of arbitrability and that the dispute was not arbitrable. They also petitioned for a temporary restraining order and preliminary injunction to stay the arbitration. The court issued a temporary restraining order, and set the cause for a hearing.

Defendant responded by filing a cross-petition for an order compelling arbitration. The court granted the petition, and its order compelling arbitration also stated "the arbitrator is not empowered to adjudicate claims for latent or patent defects. (Section 337.1 and 337.15, Code of Civil Procedure)." The language in the court's order tracked the language of the arbitration clause expressly excluding such claims.[2] Thereafter, plaintiffs voluntarily dismissed their complaint with prejudice.

Defendant then filed an ex parte motion seeking a declaration that, in light of the dismissal of the complaint, she was the prevailing party under section 1032.[3] She also sought, by noticed motion, an award of attorney fees incurred in defending against the

[1] Unless otherwise stated, further statutory references are to the Code of Civil Procedure.

[2] The parties disagree over the interpretation of the order. Their dispute concerns whether, by compelling arbitration, the court implicitly determined that defendant's claims were arbitrable, or left it to the arbitrator to determine whether some or all of her claims fell within this exclusion in the arbitration clause. Nothing said in this opinion should be construed to adopt either interpretation.

[3] An award of costs incurred in judicial proceedings relating to arbitration is governed by section 1293.2.

plaintiffs' claims for declaratory and injunctive relief, based upon an attorney fee provision in the contract.[4] According to her motion, the arbitration proceeding was still pending, and a hearing was set to take place in approximately three months.

The court denied her motion for attorney fees without prejudice. It explained at the hearing that it denied the motion on the ground that it was premature to determine who was the prevailing party while the arbitration was still pending. Defendant filed a notice of appeal from "the post-dismissal order denying her motion for attorney's fees."

ANALYSIS

In the proceedings below, plaintiffs filed a petition for declaratory relief as to the arbitrability of the dispute, and for a injunction against further arbitration proceedings, and defendant filed a cross-petition to compel arbitration, which the court granted. The court denied defendant's motion for attorney fees, not on the merits, but because it concluded that the motion was premature, and stated the denial was "without prejudice."

The threshold question we must address is whether the order denying the motion for attorney fees without prejudice is appealable, because appellate jurisdiction is statutory and may not be conferred by consent of the parties. (*In re Marriage of Nicholson & Sparks* (2002) 104 Cal.App.4th 289, 291, fn. 1.) Defendant asserts, in her opening brief, that the order denying attorney fees without prejudice is appealable as a postjudgment order pursuant to section 904.1, subdivision (a)(2). In reliance upon the general rule that a dismissal with prejudice is a final judgment on the merits, defendant asserts that she obtained a final judgment in her favor with respect to the complaint and petition for injunctive relief, and that the order denying attorney fees without prejudice is therefore an appealable postjudgment order. (See, e.g., *R. P. Richard, Inc. v. Chartered Construction Corp.* (2000) 83 Cal.App.4th 146, 158.)

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[4] Pursuant to Civil Code section 1717, subdivision (b)(2), there is no prevailing party *on the contract* when a complaint is voluntarily dismissed. Therefore, defendant argued, in reliance upon *Santisas v. Goodin* (1998) 17 Cal.4th 599, 602, that the attorney fee provision was written broadly enough to include fees incurred successfully defending noncontract claims, and that the complaint for declaratory relief was not an action on the contract. We express no opinion on the merits of this argument.

A postjudgment order is appealable only if the underlying judgment is a final appealable judgment. (§ 904.1, subd. (a)(2) [appeal may be taken "[f]rom an order made after a *judgment made appealable by paragraph (1)*" (italics added)].) The flaw in defendant's analysis is that she fails to recognize the interplay between the general rules of final judgment and appealable orders set forth in section 904.1, and the more specific rules relating to arbitration set forth in section 1294. It is well established that an order compelling arbitration is not a final judgment or an appealable order, but is reviewable on appeal only from a subsequent judgment confirming or vacating the award (see § 1294.2; *Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App.4th 638, 648-649; *Melchor Investment Co. v. Rolm Systems* (1992) 3 Cal.App.4th 587, 591-592), or by way of a petition for a writ of mandate (*Wheeler v. St. Joseph Hospital* (1976) 63 Cal.App.3d 345, 353). Here, the court *granted* defendant's cross-petition to compel arbitration, and that order is clearly not a final judgment or an appealable order. For reasons we shall explain, the fact that the plaintiffs also voluntarily dismissed their complaint for declaratory relief that the dispute was not arbitrable, and the petition seeking to enjoin the arbitration, does not change the net effect of the disposition below, which was simply to order the parties to arbitration.

In *International Film Investors v. Arbitration Tribunal of Directors Guild* (1984) 152 Cal.App.3d 699 (*International Film Investors*), the court held that despite the fact that a judgment or order granting or denying a petition for an injunction is normally appealable, when the petition seeks to enjoin *arbitration*, a judgment or order *denying* the relief sought is the "practical equivalent" of *an order compelling arbitration*, and is not appealable. (*Id.* at pp. 704, 706.) Thus, despite the formal entry of a judgment or order denying injunctive relief, the court concluded that the net effect of the proceeding in the superior court was to compel arbitration. Since orders compelling arbitration are not final judgments, or appealable orders, the court dismissed the appeal. (*Id.* at p. 706.) The only procedural difference between *International Film Investors*, *supra*, and this appeal is that, instead of the court entering an order denying the declaratory and injunctive relief plaintiffs sought, the plaintiffs voluntarily dismissed, after the court granted the petition

to compel arbitration. This is a distinction without a difference. In substance, as in *International Film Investors, supra*, the relief plaintiffs sought was the converse of the relief defendant sought in her petition to compel arbitration: Plaintiffs filed a complaint and petition to *stop* the arbitration, and defendant filed a cross-petition to *compel* it. The dismissal of the complaint and petition for injunctive relief is therefore the functional equivalent of an order compelling arbitration. Moreover, the court also granted the cross-petition and affirmatively ordered the parties to arbitrate. Thus, despite the general rule that a dismissal with prejudice is a final judgment, the dismissal of a complaint for declaratory and injunctive relief, asking the court to determine arbitrability and to prevent or enjoin arbitration, is not a final judgment or an appealable order. We therefore conclude that there is no underlying final judgment determining the substantive rights of the parties, or an appealable order. (*Id.* at pp. 704, 706; see also *Muao v. Grosvenor Properties* (2002) 99 Cal.App.4th 1085, 1089-1090 [despite accompanying entry of dismissal of employee's action at law, order compelling arbitration not appealable and does not determine the merits].) In the absence of an underlying appealable judgment, the court's order denying the motion for fees without prejudice is not an appealable postjudgment order. (§ 904.1, subd. (a)(2).)

We also note the superior court itself recognized the interlocutory posture of the proceedings, by specifying that it denied defendant's motion for costs and fees on the grounds that it was *premature*, and that the denial was *without prejudice.* (See *Lachkar v. Lachkar* (1986) 182 Cal.App.3d 641, 647 [court reversed order awarding costs and attorney fees under § 1032 & Civ. Code, § 1717 to party who obtained order compelling arbitration because order was not a final judgment or determination of rights[5]]; see also *Green v. Mt. Diablo Hospital Dist.* (1989) 207 Cal.App.3d. 63 [request for costs and

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[5] We are aware that defendant limited the request for fees to those incurred with respect to the complaint and petition for declaratory and injunctive relief, and did not seek the fees incurred in compelling arbitration. Nonetheless, the rationale of *Lachkar v. Lachkar, supra*, 182 Cal.App.3d 641, applies equally because, as we have explained, *ante*, the effect of the dismissal of the complaint leaves the case in the same procedural posture as the order compelling arbitration.

attorney fees after successfully defending a motion to compel arbitration is premature, because court had yet to adjudicate underlying dispute].) The court, by issuing an order compelling arbitration, has continuing jurisdiction (§ 1292.6) to consider any subsequent petition, such as a petition to confirm, correct, or vacate the arbitration award (§ 1285) and may, once the arbitration is had or dismissed,[6] make an award of costs or fees incurred with respect to the judicial proceedings pursuant to section 1293.2. (See *California Teachers Assn. v. Governing Board* (1984) 161 Cal.App.3d 393 [order awarding attorney fees and costs to district was not premature when made after court granted association's motion to compel arbitration, and the arbitration proceeding was *dismissed* for failure of association to comply with discovery].) The order denying fees, stating it was "without prejudice," expressly contemplated that the matter could be renewed when the arbitration had concluded. Such an order is not final and appealable. (See *P R Burke Corp. v. Victor Valley Wastewater Reclamation Authority* (2002) 98 Cal.App.4th 1047, 1053.)

In a supplemental brief, defendant suggests that the order denying fees might instead be appealable as a final collateral order. To be directly appealable as a collateral order, the order denying fees would have to be final as to a collateral issue, and require the payment of money or the performance of an act.[7] (See *Sjoberg v. Hastorf* (1948)

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[6] In their respondent's brief, plaintiffs state that after defendant filed this appeal, defendant dismissed the arbitration. Defendant also states that, since this appeal was filed, the arbitrator denied *plaintiffs'* post-dismissal fee request, and directed the parties to apply to the court for costs or fees incurred in judicial proceedings relating to the arbitration. These references to events since the filing of the appeal are outside the record, and do not, in any event, affect our analysis of the appealability of the order denying fees without prejudice. The possibility that these subsequent events may have occurred merely reinforces our conclusion that the court's order denying the motion for attorney fees without prejudice is interlocutory, and that at the time that order was made, there had been no final determination on the merits of the parties' dispute, nor was the order itself a final determination of the merits of defendant's request for fees and costs.

[7] Although some courts have allowed review of orders that did not require the performance of an act or payment of money, the majority consider this an essential attribute of a collateral order. (See *Lester v. Lennane* (2000) 84 Cal.App.4th 536, 562.)

33 Cal.2d 116, 119.) Here, the order denying fees is not final because it provides that the fee request is denied *without prejudice*. Nor does it require the payment of money or the performance of an act. It therefore is not appealable as a collateral order.

We also decline defendant's suggestion that we exercise our discretion to construe the appeal as a petition for a writ of mandate. Our discretion to construe an appeal as a writ should be exercised only in extraordinary circumstances. (See *Olson v. Cory* (1983) 35 Cal.3d 390, 401.) The mere fact that the issues are fully briefed is not a sufficient ground, and the issue is not otherwise likely to evade review. (See *Ballard v. Taylor* (1993) 20 Cal.App.4th 1736, 1740; cf. *Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094, 1098 [court exercised discretion to construe appeal from an order compelling arbitration as a petition for a writ of mandate because the issue was otherwise likely to evade review].)

For the foregoing reasons, we conclude there is no final judgment or appealable order, and that the appeal must be dismissed.

CONCLUSION

The appeal is dismissed. Plaintiffs are entitled to costs on appeal.

STEIN, Acting P. J.

We concur:

SWAGER, J.

MARGULIES, J.